FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: May 22, 2006

SUBJECT: COMMENT: DRAFT AO 2006-19

Transmitted herewith are two timely submitted comments regarding the above-captioned matter from the following:

Lance H. Olson, General Counsel for the California Democratic Party; and

Paul S. Ryan, Associate Legal Counsel, on behalf of the Campaign Legal Center and Democracy 21.

The proposed draft advisory opinion is being considered under an expedited process.

Attachments

May 22, 2006

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments on Advisory Opinion Request 2006–19

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2006–19, an advisory opinion request submitted by the Los Angeles County Democratic Party (LACDP), seeking advice on "[w]hether the LACDP's anticipated member communications . . . constitute[] 'federal election activity' and must be allocated and paid for in part with federally qualified funds pursuant to 11 C.F.R. Section 300.33." AOR 2006–19 at 3.

The Commission's Office of General Counsel (OGC) published a draft AO 2006–19 on May 18, 2006. For the reasons set forth below, we agree with the general counsel's analysis and urge the Commission to approve without amendment the May 18 draft AO advising the LACDP that, "[b]ecause the activities in question constitute Federal election activity, LACDP must pay for those activities entirely with Federal funds or a mix of Federal funds and Levin funds." May 18 Draft AO 2006–19 at 1.

I. BCRA's "Federal Election Activity" Restrictions Are Constitutional and Critical to Preventing Circumvention of the Soft Money Ban.

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits national party committees from soliciting, receiving, or directing soft money. 2 U.S.C. § 441i(a). Similarly, FECA provides: "[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act." 2 U.S.C. § 441i(b)(1). The Act contains a limited exception for certain "Federal election activity" that a state party committee may finance with an allocated mixture of hard money and so-called Levin funds. 2 U.S.C. § 441i(b)(2).

The Act defines "Federal election activity" to include, *inter alia*, "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (*regardless of whether a candidate*

for State or local office also appears on the ballot)." 2 U.S.C. § 431(20)(A)(ii) (emphasis added).

Congress' overriding purpose in enacting the state party soft money restrictions was to avoid circumvention of the Federal campaign finance laws. One of BCRA's principal sponsors said that in closing the soft money loophole, Congress took "a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties," while "not attempt[ing] to regulate State and local party spending where this danger is not present, and where State and local parties engage in *purely non-Federal activities*." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of "Federal election activity" to cover only those activities that "in the judgment of Congress . . . clearly affect Federal elections," and left unregulated "activities that affect purely non-Federal elections." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

These provisions of BCRA were upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). The Court said that the regulation of "Federal election activities" by state and local parties was a permissible means of preventing "wholesale evasion" of the national party soft money ban "by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections." *Id.* at 161. The Court noted:

> [I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. *Rather, state committees function as an alternative avenue for precisely the same corrupting forces.*

Id. at 164 (emphasis added). The Court continued:

> Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was "neither novel nor implausible" for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees . . . .

Id. at 166 (internal citation omitted) (quoting *Nixon v. Shrink*, 528 U.S. 377, 391 (2000)). The *McConnell* Court concluded that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *McConnell*, 540 U.S. at 165–66.

The Court went on to explicitly discuss BCRA's definition of "Federal election activity," explaining that BCRA's ban on state party use of soft money for "Federal election activity" "is narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those

contributions to state and local parties *that can be used to benefit federal candidates directly*." *Id.* at 167 (emphasis added). The Court continued:

> Common sense dictates, and it was "undisputed" below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office. It is equally clear that federal candidates reap substantial rewards from *any efforts that increase the number of like minded registered voters who actually go to the polls*.

Id. at 167–68 (internal citations omitted) (emphasis added).

The Court concluded: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *Id.* at 168. The Court upheld BCRA's prohibition on state party soft money expenditures for "Federal election activity" as "a reasonable response to that risk." *Id.*

For all of these purposes, the statute treats local party committees and state party committees identically. *See* 2 U.S.C. § 441i(b) (applying to "State, district and local committees").

II. The LACDP's proposed activity clearly constitutes "Federal election activity."

As noted in the OGC's draft opinion:

> On June 6, 2006, the voters in the City of Long Beach . . . will vote for local candidates in the non-partisan, general election *as well as for Federal candidates in the primary election*. LACDP intends to make pre-recorded, electronically dialed telephone calls and send direct mail to voters registered as Democrats in Long Beach between May 22 and June 2, 2006. . . . Both the telephone scripts and the direct-mail piece state the date on which the election will be held.

May 18 Draft AO 2006–19 at 1–2 (emphasis added).

This proposed activity clearly constitutes "Federal election activity," which is defined by BCRA to include "get-out-the-vote activity . . . conducted in connection with an election in which a candidate for Federal office appears on the ballot (*regardless of whether a candidate for State or local office also appears on the ballot*)." 2 U.S.C. § 431(20)(A)(ii) (emphasis added). The proposed LACDP activity is GOTV activity, and it is conducted in connection with an election in which Federal candidates will appear on the same ballot.

The applicability of BCRA's "Federal election activity" restrictions is made even more evident by the Commission's regulations defining the phrases "get-out-the-vote activity" and "in connection with an election in which a candidate for Federal office appears on the ballot." The Commission's regulations define "get-out-the-vote activity" to mean:

> . . . contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity includes, but is not limited to . . . providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places[.]

11 C.F.R. § 100.24(a)(3). Commission regulations further provide that the phrase "in connection with an election in which a candidate for Federal office appears on the ballot" means (in the case of a state such as California, which holds primary elections), "[t]he period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates . . . and ending on the date of the general election . . . ." 11 C.F.R. § 100.24(a)(1)(i). The "Federal election activity" time period in California in 2006 is from March 10, 2006 to November 7, 2006. May 18 Draft AO 2006–19 at 3.

The LACDP intends to engage in GOTV activities for the June 6 consolidated local and Federal election by contacting Democratic registered voters by telephone and another "individualized means"—direct mail—to provide them with information—including the date of the election—in order to assist them in engaging in the act of voting. The LACDP intends to engage in this activity during the "Federal election activity" time period established by Commission regulation.

These proposed activities thus fall squarely within the plain terms of the statutory language and the Commission's regulations. As such, they clearly constitute "Federal election activity" under 2 U.S.C. § 431(20)(A)(ii) and 11 C.F.R. § 11 C.F.R. § 100.24. Consequently, the LACDP must pay for these activities with Federal funds or with a combination of Federal funds and Levin funds, as required by 2 U.S.C. § 441i(b).

III. The LACDP does not seek an interpretation of existing laws but, instead, seeks the creation of an exception from clearly applicable laws—an exception beyond the Commission's authority.

Given the obvious facial applicability of 11 C.F.R. § 100.24(a) to the proposed activities here, what the LACDP actually seeks in AOR 2006–19 is not clarification regarding the application of the regulation to its proposed activities but, rather, the establishment of a new rule of law exempting from regulation proposed activities that are clearly covered by the regulation.

Doing so would be completely unwarranted. The establishment of such a rule of law by advisory opinion is beyond the Commission's authority in two respects. First, BCRA's restrictions on "Federal election activity" by state and local parties apply to all "get-out-the-vote activity . . . conducted in connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. § 431(20)(A)(ii). The Commission has no authority to carve out, either by regulation or by advisory opinion, exemptions from the plain language of the statute that requires Federal funds to be spent for GOTV activity in connection with an election in which Federal candidates appear on the ballot. Second, the Commission is not authorized to establish any new rule of law through issuance of an advisory opinion. Under the FECA and Commission regulations, a new rule of law "may be initially proposed by the Commission only

as a rule or regulation," not as an advisory opinion. 2 U.S.C. § 437f(b); *see also* 11 C.F.R. § 112.4(e).

IV. Conclusion

For the reasons set forth above, we urge the Commission to approve without amendment the OGC's May 18 draft AO advising the LACDP that, "[b]ecause the activities in question constitute Federal election activity, LACDP must pay for those activities entirely with Federal funds or a mix of Federal funds and Levin funds." May 18 Draft AO 2006–19 at 1.

Respectfully,

/s/ Fred Wertheimer

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